No. 14,086

IN THE

United States Court of Appeals

For the Ninth Circuit

STEPHEN KONG, JR.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Territory of Hawaii.

APPELLANT'S REPLY BRIEF.

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SPECIFICATION OF ERROR NO. 1.

THE COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT AND IN DENYING APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL ON THE GROUND THAT DEFENDANT WAS DEPRIVED OF HIS RIGHT TO A SPEEDY TRIAL.

It is respectfully submitted in reply to appellee's statement on page 5 of its brief that the placing of indictment against appellant on the secret file "was done, not for personal reasons of the United States attorney, but at the behest and on the recommendation of the judge who was then trying" another case is not consonant with what occurred when he made the request for secrecy. All that took place at that time is

set forth on pages 4 and 5 of the Record. He made no reference to any command, mandate, or injunction (which appellant apprehends is the definition of the term "behest" used by appellee in this connection) nor even to a "recommendation" by another judge. To the contrary the United States Attorney based his request solely (as he phrased it) "in order that the government can never be accused of creating a climate that may be prejudicial to any of the defendants" then on trial (later convicted) of a violation of the Smith Act.

In reply to the contention that the right to a speedy trial is not absolute but only relative, it is respectfully submitted that all that is relative about the Sixth Amendment is the rate of speed with which an accused is brought to trial after being taken into custody. The relativity is limited to incidents peculiar to a given defendant, but his right cannot be taken from him, as was done in this case,—not because of an equal right guaranteed him nor because of a superior right guaranteed by the Constitution to another,—but because, forsooth, the prosecutor anticipated that a group of Communists then on trial, or perhaps their fellow-travelers, might falsely accuse the government acting through him "of creating a climate prejudicial to them".

The true significance of *Beavers v. Haubert,* 198 U.S. 77, cited on page 3 of appellee's brief on the subject of the right to a speedy trial becomes readily apparent upon reading all that the Court had to say on

the point. We respectfully submit it does not support the peremptory effect claimed for it.

In the belief that it will prove helpful the complete language of the Court is here set out.

> Undoubtedly a defendant is entitled to a speedy trial and by a jury of the district where it is alleged the offense was committed. This is the injunction of the Constitution, but suppose he is charged with more than one crime, to which does the right attach? He may be guilty of none of them, he may be guilty of all. He cannot be tried for all at the same time, and his rights must be considered with regard to the practical administration of justice. To what offense does the right of the defendant attach? To that which was first charged or to that which was first committed? Or may the degree of the crimes be considered? Appellant seems to contend that right attaches and becomes fixed to the first accusation and whatever be the demands of public justice they must wait. We do not think the right is so unqualified and absolute. If it is of that character it determines the order of trial of indictments in the same court. Counsel would not so contend at the oral argument, but such manifestly is the consequence. It must be remembered that the right is a constitutional one, and if it has any application to the order of trials of different indictments it must relate to the time of trial, not to the place of trial. The place of trial depends upon other considerations. It must be in the district where the crime was committed. There is no other injunction or condition and *it cannot be complicated by rights having no connection with it.* (Emphasis added.)

> The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. It cannot be claimed for one offense and prevent arrests for other offenses; and removal proceedings are but process for arrest,—means of bringing a defendant to trial.

It is difficult (for appellant, at least) to relate appellee's reference to *Delaney v. United States,* 1 Cir. 1952, 199 F. 2d 107, as support for its contention that individual constitutional rights of a defendant in one case are to be balanced against the constitutional rights of other defendants and the scales weighted "in the judgment of the prosecuting branch of our government". This the trial Court tried to do in the *Delaney* case by refusing to grant

> "a continuance of the trial for a longer period, until such time as it could be estimated with greater assurance that the prejudicial effect of the aforesaid publicity in the newspapers and magazines, over the radio and on television, had so far worn off that the trial could proceed free of the enveloping atmosphere and public preconception of guilt prevalent on January 3, 1952, when appellant was brought to trial."

In the case of *United States v. Rosenberg,* 2 Cir. 1952, 200 F. 2d 666 cited by appellee in opposition to appellant's contention that the guarantee under the Sixth Amendment to the Constitution of the United States to "enjoy the right to a speedy trial" was de-

nied him, the Court did not "score the United States Attorney" for simply procuring an indictment in the due course of his duties. An examination of the language used by Chief Judge Swan discloses that what he referred to as "tactics (which) cannot be too severely condemned" was the United States Attorney's procuring a perjury indictment of a person whom he had expected to use in a case then on trial and publicizing the fact.

The question for decision was not one of constitutional law, but whether an order dismissing appellants' petitions under Title 28, U.S.C.A., Section 2255 that they be released from imprisonment was proper. The Court held that such a petition cannot "be used to obtain a retrial according to procedure which the petitioners voluntarily discarded and waived at the trial upon which he was convicted".

The other cases cited by appellee, not otherwise commented upon in this reply brief, are *United States v. McWilliams,* App. D.C. 1947, 163 F. 2d 695 and *United States v. Holmes,* 3 Cir. 1948, 168 F. 2d 888.

The quotation in the first of these is from a dissenting opinion of Associate Justice Edgerton.

The *Holmes* case, like all other cases on this point which have come to appellant's attention whether as a result of his own research or of citation in appellee's brief was not a case in which the defendants invoked their constitutional rights at the first opportunity or at all promptly. We have found no case which, like the instant appeal, involves placing an in-

dictment on the secret file for other than the well known reasons for so doing, and contemplated by Federal Rules of Criminal Procedure, namely, to prevent flight.

Dated, Honolulu, Hawaii,
June 14, 1954.

Respectfully submitted,
O. P. SOARES,
Attorney for Appellant.